WILLMS & SHIER
ENVIRONMENTAL LAWYERS LLP

Report

ENVIRONMENT • ABORIGINAL • ENERGY

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Ottawa raises the penalties for statutory and regulatory offences under *CEPA 1999*

Ottawa has taken the second step in its three-phase scheme to 'get tough' on environmental crime. On June 22, 2012, sections of the *Environmental Enforcement Act* (*EEA*) came into force, amending certain offence, penalty and sentencing provisions of the *Canadian Environmental Protection Act, 1999.* Designated statutory and regulatory offences involving "direct harm or risk of harm to the environment, or obstruction of authority" are now subject upon conviction to increased fines ranging as high as $6 million for large firms. Whether Environment Canada will avail itself of its new enforcement tools – or the courts will impose significantly higher penalties – remains to be seen. (The revised fine schedule and statutory provisions to which it applies are summarized in the table on page 3.)

Phase One of the federal enforcement strategy entailed the enactment of the *EEA*, amending nine existing environmental statutes administered by Environment Canada and Parks Canada, and creating a new Act called the *Environmental Violations Administrative Monetary Penalties Act* (*EVAMPA*). The *EEA* did not amend either the *Fisheries Act* or the *Species at Risk Act*. The

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IBA signed for Young-Davidson gold mine project

On July 14, 2012, Willms & Shier client Temagami First Nation/Teme-Augama Anishnabai (TFN/TAA) signed an Impact Benefit Agreement (IBA) with Toronto-based resource company AuRico Gold concerning the Young-Davidson Mine in northeastern Ontario. The IBA establishes the framework for a variety of co-operative initiatives between TFN/TAA and the resource company covering environmental monitoring and protection, training and employment, business opportunities and other mutual benefits. Over the last six months, Willms & Shier legal staff have worked closely with TFN/TAA in their negotiations with AuRico Gold. Commercial production at the Young-Davidson open pit gold mine and mill complex began this fall. Underground development is also underway.

EEA received Royal assent on June 18, 2009, and the bulk of the Act was brought into force by an Order in Council in December of 2010. (See 2009 Law Reports March/April and July/August.) Phase Three will see the extension of the fine schedule to several additional federal statutes and the implementation of the Administrative Monetary Penalty (AMP) provisions under *EVAMPA*.

In addition to the new schedule of fines, several other *CEPA* amendments took effect on June 22

- If a person or ship convicted of an offence acquired any property, benefit or advantage, the court shall order the offender to pay an additional fine in an amount equal to the court's estimation of the value of that property, benefit or advantage.
- A corporation convicted of an offence may be ordered to notify its shareholders (in the manner and within the time directed by the court) of the facts relating to the offence and the punishment imposed.
- Upon conviction, directors, officers and mandataries would be subject to the same penalties as "individuals" under the Act.
- The liability provisions have been extended to a ship's owner, where the owner is not a corporation, while limiting liability to only those who actually did direct or influence the ship's policies or activities that resulted in the offence.
- If a person is convicted for failing to remit or cancel tradable units, the court may order the person to remit or cancel those tradable units (in addition to any other punishment).
- The limitation period for instituting summary proceedings has been extended from two to five years.

The amendments also permit the Governor in Council to extend the schedule of increased fines to the contravention of specified regulatory provisions. Federal regulation SOR/2012-134 designates offences under 25 *CEPA* regulations as subject to the revised fine scheme and came into effect on July 4, 2012. (See the table on page 4 for a list of the relevant regulatory provisions.)

Administrative Monetary Penalties coming

EVAMPA provides the authority to issue AMPs under ten federal environmental statutes providing regulators with an alternative enforcement tool to "address less serious environmental offences that are often not pursued because of the complexity and high costs of prosecution." While the violations subject to AMPs are still to be determined, the maximum penalty levels are set at $5,000 for an individual and $25,000 for any other accused. In June 2011, Environment Canada released a regulatory proposal, setting out key elements of the regulation that would be required to implement an AMP system.

During the third phase of this process, currently scheduled to take place in 2013, Ottawa intends to bring into effect the AMPs system under *EVAMPA*. The

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CCME develops standard procedures for risk assessments

The Canadian Council of Ministers of the Environment (CCME) has released for public review its draft *Manual for Environmental Site Characterization in Support of Environmental and Human Health Risk Assessment.* The manual provides a consistent approach to sampling and analyzing complex environmental matrices.

The first three volumes offer general guidance for undertaking risk assessments, a series of checklists (including a summary of site conditions, a review of the environmental site characterization report and information for soil vapour studies) and suggested operating procedures. A fourth volume describing analytical methods for contaminated sites is currently being revised and will be posted for public review when available.

The CCME is accepting comments on the first three volumes until November 30, 2012. For more information, visit the CCME website at http://www.ccme.ca/ourwork/soil.html?category_id=44

New CEPA fines took effect June 22, 2012

The *Environmental Enforcement Act* established a range of heavy fines for individuals, corporations, ships and "other persons" that are convicted of any of a number of designated offences in *CEPA 1999* or the regulations made under that Act. Effective June 22, 2012, amended section 272 of *CEPA 1999* sets minimum and maximum fines for the most serious statutory and regulatory offences, ranging from $5,000 for a first offence by an individual to $6 million for a large corporation. The fines are doubled for second and subsequent offenders. This table summarizes the increased penalties, as well as the statutory provisions to which they may apply. The table on page 4 lists the designated regulatory offences.

Fines for Designated Offences[1]
(Minimum[2] and maximum fines)

Offender	Summary Conviction		Conviction on Indictment	
	1st Offense	2nd and Subsequent[3]	1st Offence	2nd and Subsequent[3]
Individuals	$5,000 to $300,000 (and/or 6 months)	$10,000 to $600,000 (and/or 6 months)	$15,000 to $1,000,000 (and/or 3 years)	$30,000 to $2,000,000 (and/or 3 years)
Small revenue corporations[4] or ships under 7,500 tonnes of deadweight	$25,000 to $2,000,000	$50,000 to $4,000,000	$75,000 to $4,000,000 (see note 5)	$150,000 to $8,000,000 (see note 5)
Corporations or ships of 7,500 tonnes deadweight or over	$100,000 to $4,000,000	$200,000 to $8,000,000	$500,000 to $6,000,000 (see note 5)	$1,000,000 to $12,000,000 (see note 5)

1. Under s.272 of *CEPA 1999*, this schedule of fines applies to every person who contravenes or fails to comply with: ss.16(3) or (4), any of ss.81(1), (2), (3), (4), (10), (11) & (14), 84(2), and 96(3) & (4), s.101, any of ss.106(1), (2), (3), (4), (10) & (11) and 109(2), s.117 or 123, any of ss.124(1), (2) & (3), 125(1), (2), (3), (4) & (5), 126(1) & (2) and 139 (1), s.142 or 144, ss.150(3) or (4), s.152, ss.153(1), s.154, ss.155(5), s.171 or 181 or ss.185(1), 186(2), 189(1), 202 (3) or (4) or 213(3) or (4), paragraph 228(a) or ss.238(1); an obligation set out in s.70, 86, 95 or 111, ss.169(1), 172 (1), 179(1), 182(1), 201(1) or 212(1); a prohibition imposed under ss.82(1) or (2), 84(1)(b), 107(1) or (2), 109(1)(b), 186(1), or 225(4); a condition of a permission granted under ss. 84(1)(a) or 109(1)(a); an interim order made under ss.94(1), 173(1), 183(1) or 200.1(1); a direction given under s.99, 119 or 148; knowingly contravenes ss.28(b); any provision of the regulations designated by regulations made under s.286.1 for the purpose of this paragraph; or an agreement as defined in s.295; contravenes an order, direction or decision of a court made under this Act; knowingly provides any false or misleading information, results or samples; or knowingly files a document that contains false or misleading information.
2. Under s.273, the court may impose a fine that is less than the minimum amount if it is satisfied, on the basis of evidence submitted, that the minimum fine "would cause undue financial hardship."
3. Under ss.273.1 a conviction is deemed to be a conviction for a second or subsequent offence if the court is satisfied that the offender has been previously convicted — under any Act of Parliament, or any Act of the legislature of a province, that relates to environmental or wildlife conservation or protection — of a substantially similar offence
4. A corporation is considered to be a "small revenue corporation" if its gross revenues for the 12 months immediately before the first day on which the subject matter of the proceedings arose were not more than $5,000,000.
5. Under ss.274(1), every person is guilty of an offence and liable on conviction on indictment to a fine or to imprisonment for a term of not more than five years, or to both, who, in committing an offence under this Act, (a) intentionally or recklessly causes a disaster that results in a loss of the use or the non-use value of the environment; or (b) shows wanton or reckless disregard for the lives or safety of other persons and thereby causes a risk of death or harm to another person.

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Government will also publish an Order in Council and regulations bringing into effect the amended fine regime under the *Migratory Birds Convention Act, 1994* and the *Canada Wildlife Act*, as well as the remaining provisions of the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade* Act.

***CEPA 1999* Regulatory Provisions Designated under the Increased Fine Scheme**	
***CEPA 1999* Regulations**	**Designated Provisions**
Federal Mobile PCB Treatment and Destruction Regulations	s.5, s.6, ss.7(1), s.8, and s.9
Chlor-Alkali Mercury Release Regulations	ss.3(1) & (3)
Asbestos Mines and Mills Release Regulations	ss.3(1)
Secondary Lead Smelter Release Regulations	s.3, and s.4
Contaminated Fuel Regulations	s.3
Pulp and Paper Mill Effluent Chlorinated Dioxins and Furans Regulations	ss.4(1)
Pulp and Paper Mill Defoamer and Wood Chip Regulations	s.4
Vinyl Chloride Release Regulations, 1992	ss.4(1) to (4)
PCB Waste Export Regulations, 1996	s.3, and s.11
Benzene in Gasoline Regulations	s.3, s.4, ss.13(5), ss.16(1) & (7), and ss.17(1)
Ozone-depleting Substances Regulations, 1998	s.4, s.5, ss.6(1), ss.7(1), ss.8(1), (2) & (3.1), s.9, s.18, s.19, ss.21(1), s.22, ss.23 (1) & (2), ss.24(1), s.25, s.26, ss.27(1), s.28, ss.29(1), and s.30
Gasoline and Gasoline Blend Dispensing Flow Rate Regulations	s.3
Tributyltetradecylphosphonium Chloride Regulations	s.3, and s.4
Tetrachloroethylene (Use in Dry Cleaning) Regulations	s.3, s.4, s.5, s.7, and s.10
Solvent Degreasing Regulations	ss.3(1)
Federal Halocarbon Regulations, 2003	s.3
Prohibition of Certain Toxic Substances Regulations, 2005	s.4, and s.5
2-Butoxyethanol Regulations	ss.2(1), s.3, and ss.4(1)
Perfluorooctane Sulfonate and its Salts and Certain Other Compounds Regulations	s.4
Storage Tank Systems For Petroleum Products and Allied Petroleum Products Regulations	s.3, s.5, s.6, s.7, s.8, ss.9(1), ss.10(1), s.11, s.12, ss.14(7), ss.15(1), ss.36(2), ss.37(2), ss.38, ss.40(1), and ss.44(3)(c)
Polybrominated Diphenyl Ethers Regulations	s.6, and ss.7(1)
PCB Regulations	s.5, and s.6
Chromium Electroplating, Chromium Anodizing and Reverse Etching Regulations	ss.3(1)
Volatile Organic Compound (VOC) Concentration Limits for Automotive Refinishing Products Regulations	ss.3(1) & (2), and ss.4(1)
Volatile Organic Compound (VOC) Concentration Limits for Architectural Coatings	ss.3(1), ss.4(1), ss.5(1), and ss.9(1)

What's new in the hydraulic fracturing of gas and oil shale?

Since our December 2011 Special Report on hydraulic fracturing, we have received a number of requests from clients and readers for updates. In response, here are several news stories that may impact the future development of shale gas and oil reserves in Canada.

Silica used in fracking poses worker health risk

The US National Institute for Occupational Safety and Health (NIOSH) says recent field studies show that workers may be exposed to high levels of respirable crystalline silica dust during hydraulic fracturing. In air samples taken at 11 hydraulic fracturing sites in five states, 79 per cent showed silica exposures greater than the NIOSH Recommended Exposure Limit (REL) of 0.05 milligrams per cubic meter. Almost one-third of all samples showed silica exposures 10 or more times the REL. Large quantities of silica sand are blended with other hydraulic fracturing fluids prior to high pressure injection into the drilling hole to fracture the shale. Sand flows into the fissures, keeping them open so that the oil or natural gas from the shale can flow up and out of the well. Clouds of respirable silica dust may be released during transport, unloading into sand movers, along transfer belts and while the sand is loaded into blending hoppers. A NIOSH Hazard Alert covers the health hazards associated with hydraulic fracturing, including exposures to silica in the air, and recommends ways to protect workers. The Hazard Alert is available on-line at http://www.osha.gov/dts/hazardalerts/hydraulic_frac_hazard_alert.html

Earthquakes registered in BC's shale gas fields

Between April 2009 and December 2011, a total of 272 seismic events were recorded by government and industry seismic sensors in the Horn River basin in northeastern British Columbia. According to an investigation conducted by the BC Oil and Gas Commission, these were "caused by fluid injection during hydraulic fracturing in proximity to pre-existing faults." Both minor seismic events (magnitude 2.0 to 3.8) and micro-seismic events (less than magnitude 2) were recorded. However, the Commission notes that "none of the events caused any injury, property damage or posed any risk to public safety or the environment." Shale gas fields in northeastern BC are under active development with more than 8,000 high-volume hydraulic fracturing operations undertaken to date. To reduce the risk of seismic activity, the Commission makes seven recommendations, including: submitting micro-seismic reports; establishing a notification and consultation procedure; studying the relationship of hydraulic fracturing parameters on seismicity, and upgrading and improving B.C.'s seismograph grid and monitoring procedures. A follow-up study with the University of British Columbia will examine factors related to the magnitude, impact and control of induced seismicity in northeast BC. In the meantime, the natural gas sector is finalizing new industry guidelines establishing monitoring protocols and practices to mitigate induced seismicity. Copies of the Commission report are available on-line at http://www.bcogc.ca/

Ottawa relegates regulation of fracking industry

In a July 2012 e-mail to the *Edmonton Journal*, Natural Resources Canada (NRC) spokeswoman Jacinthe Perras wrote that the "Provinces have exclusive legislative jurisdiction over the non-renewable natural resources that lie within their boundaries. Provinces are therefore solely responsible for the regulation of resource development, and have various regulatory requirements for oil and gas drilling and hydraulic fracturing." NRC Minister Joe Oliver in an earlier letter to the president of the Canadian Association of Petroleum Producers, obtained by the *Journal* through an access to information request, congratulated the industry on its "proactive approach towards water management practices and reporting" and "its responsible development of Canada's natural resources. Along with robust provincial regulations, this will help attract investment and support the diversification of our oil and gas export markets." However, the Minister has said that his department will not be introducing national standards on chemical disclosure, water use or other regulatory issues related to hydraulic fracturing.

The EA clock is ticking:
Ottawa sets deadlines for review of several high profile environmental assessments

On August 3, 2012, the federal Minister of the Environment (in consultation with his provincial counterparts) imposed a series of timelines on various projects undergoing environmental assessment under the *Canadian Environmental Assessment Act, 2012*. These timelines require that Joint Hearing Panels be established for two projects by mid-March of 2013 – the Frontier Oil Sands Mine Project and the Site C Clean Energy (hydroelectric) Project on the Peace River in northeastern BC. Ottawa has also set tighter deadlines for the submission of panel reports and the release of final decisions for another seven projects. For example, the Joint Review Panel overseeing the contentious assessment of the Enbridge Northern Gateway Project must submit its report no later than December 31, 2013. The Government's decision statement is due approximately six months from submission of that Panel's report and regulatory recommendation. If the Enbridge project is approved, the National Energy Board will issue a Certificate of Public Convenience and Necessity within seven days of the Government's decision statement. The table below summarizes the recent timeline announcements posted on the website of the Canadian Environmental Assessment Agency (CEAA).

Project Name	**Proponent**	**CEAA Ref. #**	**Referred to Hearing/ Review Panel**	**Timelines[1]**	
				Panel Report	**Minister's Decision[2]**
Deep Geologic Repository Project	Ontario Power Generation	17520	June 29/07	17 months (Dec. 2013)	4 months
Enbridge Northern Gateway Project	Northern Gateway Pipelines Inc.	21799	Sept 29/06	543 days (Dec 31/13)	180 days
EnCana/Cenovus Shallow Gas Infill Project at CFB Suffield	EnCana Corporation	15620	April 24/06	5 months (Dec. 12)	
Frontier Oil Sands Mine Project	Teck Resources Ltd. & SilverBirch Energy Corp.	65505	8.5 months[3]	10 months	4 months
Jackpine Mine Expansion Project	Shell Canada Ltd.	59540	Dec 13/10	350 days (June 2013)	4 months
Marathon Platinum Group Metals and Copper Mine Project	Stillwater Canada Inc.	54755	Oct 7/10	13 months (Aug. 2013)	4 months
New Prosperity Gold-Copper Mine Project	Taseko Mines Ltd.	63928	Nov 7/11	7.5 months (Feb. 2013)	4 months
Pierre River Mine Project	Shell Canada Ltd.	59539	Dec 13/10	18 months (Jan. 2014)	4 months
Site C Clean Energy Project	BC Hydro and Power Authority	63919	8.5 months[3]	7.5 months	6 months

Footnotes

1. Set from the date that the *Canadian Environmental Assessment Act, 2012* took effect on July 6, 2012. The above timelines do not include the time the proponent takes to gather information required for the environmental assessment. Bracketed date indicates estimated deadline.
2. From date of submission of panel report to Minister.
3. The timeline for the Joint Review Panel to be established is 260 days (8.5 months) from the coming into force of *CEAA 2012*.

Ontario continues to streamline approvals process for renewable energy projects

The Ministry of the Environment continues to revise its regulations and policies to streamline and clarify the renewable energy approvals (REA) process for green energy projects. On July 20, 2012, the Ministry posted a proposal to draft a new set of amendments to its REA Regulation (O. Reg. 359/09) under the *Environmental Protection Act* to address a number of concerns raised during consultation on an earlier package of revisions (see sidebar). However, proposed regulatory text is not included with the posting. The deadline for comments closed on September 3, 2012.

Currently, if the Environmental Review Tribunal (ERT) does not make a decision in respect of a third-party hearing within six months, the decision of the Director is deemed to be confirmed. However, the clock stops running when the ERT grants an adjournment for a judicial review until that review is disposed of. The Ministry is looking for suggestions on how it might speed up the process and limit the length of time the approvals clock could be stopped for a judicial review.

Under the existing regulation, the proponent of a Class 4 wind turbine project must submit an application within six months of completing a draft site plan. The Ministry proposes increasing that deadline to 18 months (with no further extensions permitted) and the proponent would not have to consider any new noise receptors that come into existence during that period. The proposed amendment would also permit the issuance of additional draft site plans within the 18 month period in response to issues that are raised during consultation or additional studies. Proponents would also be required to make available both the draft site plan and their wind turbine noise assessment report.

Finally, five amendments are being proposed to the natural heritage protection and assessment provisions to reflect project insights, best practices and lessons learned since the regulation came into force in 2009. These would

- increase the deadline for submitting an application for a Class 4 wind turbine to 18 months from the date the draft site plan is completed (the proponent would not have to consider any new noise receptors that come into existence during that period)
- reduce natural feature setbacks from 120 to 50 metres for the generation components of ground mount solar projects
- reduce setbacks from 120 to 50 metres when expanding existing infrastructure (e.g., roads and transformer stations) or constructing new transmission or distribution lines.
- remove consideration of valley lands as natural features. The setback and assessment requirements were deemed "duplicative" of other approval requirements by the Ministry of Natural Resources and Conservation Authorities.

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Other changes to the REA process ...

The proposed REA amendments are the latest in a series of attempts to spur the development of renewable energy under the province's green energy initiative. On July 1, 2012, a series of amendments to O. Reg. 359/09 under the *EPA* and to Regulation 334 under the *Environmental Assessment Act* came into force (see EBR #011-5932). Among other things, these address

- dealing with project changes after the initial notice is given
- the screening and assessment of cultural heritage features
- project notifications and the timing of public meetings
- exemptions for noise and odour receptors
- spill containment around transformer substations
- the definition of solar nameplate capacity
- exemptions for roads and water crossings on Crown lands
- noise setbacks for wind turbines

At the same time, the Ministry issued an updated edition of its *Technical Guide for Renewable Energy Approvals.*

To further speed approvals, the Ministry of the Environment is considering the addition of small ground-mounted solar, on-farm anaerobic digestion, and landfill gas electricity generation projects to its self-screening Environmental Activity and Sector Registry (EASR) process (see the story on page 8 of this newsletter).

For information on the approvals process …

FIT contract holders and applicants should contact the Ministry of Energy's Renewable Energy Facilitation Office. The REFO is a 'one-window' access point for obtaining information and connecting with the appropriate government and agency resources. You can reach the REFO:

By e-mail at REFO@ontario.ca
By phone at 1-877-440-7336 (416-212-6582 in the GTA)
On the Internet at www.energy.gov.on.ca/en/renewable-energy-facilitation-office

- align REA development prohibitions for provincially significant southern and coastal wetlands with those in the Provincial Policy Statement. This would allow new transmission and distribution lines, as well as changes to existing infrastructure, in these natural features subject to the completion of an environmental impact study that addresses potential negative effects.
- focus on identifying natural features and boundaries during the site investigation. Only where a project is to be located inside of the setback will a proponent need to evaluate the function, attributes and composition of the feature.

MOE to expand permit-by-rule registry

The Ontario Ministry of the Environment has proposed adding a number of new sectors to its Environmental Activity and Sector Registry (EASR). A regulatory proposal posted to the Environmental Registry on July 25, 2012 (EBR #011-6567), would see the addition of three new sectors – small ground-mounted solar (covering units between 10 and 500 KW); lithographic, screen and digital printing; and non-hazardous waste transportation systems (but not waste storage, land application or other types of waste disposal or processing). It would also amend the existing EASR requirements for standby power systems. The deadline for comments was September 8, 2012.

Under the Ministry's streamlined approvals process, proponents may register prescribed activities through the web-based EASR instead of seeking an Environmental Compliance Approval through the normal application and review process. EASR registrants are also required to comply with operating requirements as set out in regulation – such as design requirements, pollution control measures and best management practices – as well as maintain their registrations with up-to-date information.

To date, the EASR covers automotive refinishing facilities, heating systems, and standby power systems, with eligibility and operating requirements set out in O. Reg. 245/11 under the *Environmental Protection Act*. Two postings earlier this year (EBR #011-4926 and #011-5695) proposed the addition of five more sectors: printing; waste collection and transport; ready-mix concrete; concrete products manufacturing; and small-scale renewable energy projects (including ground-mounted solar, on-farm anaerobic digestion, and landfill gas electricity generation).

Proposed EASR Regulations

Small Ground-Mounted Solar – specific design criteria include (but are not limited to) setbacks to noise receptors, size limitations and siting criteria to mitigate environmental impacts. Projects would be directed to properties zoned and currently being used for agricultural, industrial, commercial and institutional uses or contaminated IC&I properties. Various operating requirements are proposed, such as the documenting routine maintenance, inspections and environmental complaints.

Lithographic, Screen and Digital Printing – a facility will need to meet design criteria, including limits on printing materials usage, setbacks to account for air and noise emissions, operating hours for various pieces of equipment, and limits on the volatile organic compound content of inks, fountain solutions and other products.

Non-Hazardous Waste Transportation Systems – covers the use of a vehicle for the collection, handling, transportation and transfer of waste and requires that systems meet design requirements for trucks, mandatory insurance, and record keeping related to complaints, driver training and spills response, among others.

BC Appeal Court tightens grounds for Aboriginal title claims, places emphasis on Aboriginal rights

A recent decision of the British Columbia Appeal Court has tightened the criteria for establishing Aboriginal title over traditional lands. The Court has re-cast the test for Aboriginal title to include a “standard of occupation” that will restrict both the availability and size of claims.

In *William v. British Columbia*, (2012 BCCA 285), the Court of Appeal upheld a landmark BC Supreme Court judgment affirming the Tsilhqot'in Nation's Aboriginal rights to hunt and trap in – but not hold title to – a large section of its traditional territory in central British Columbia. It also affirmed that the Crown had, in its management of forestry in the area, infringed those rights. The hearing took place in November 2010 and the judgment was released June 27, 2012.

This litigation concerns Aboriginal title and rights in two areas of BC’s west central interior, totaling 4,380 square kilometres. Made up of mostly undeveloped land across the Chilcotin plateau, the Claim Area also includes Ts’il-os Provincial Park and the smaller Nuntsi Provincial Park. The Claim Area comprises only about five percent of what the Tsilhqot’in regard as their traditional territory.

Since the late 1980s, the Tsilhqot'in had opposed several logging proposals for the area. Although British Columbia had planned and authorized logging, very little logging had actually taken place in the Claim Area because of litigation. The court considered nature and scope of the Aboriginal rights together with the evidence of high-level effects of forest practices on the rights of the Tsilhqot’in by affecting the diversity of species and abundance of wildlife.

During the initial trial, *Tsilhqot’in Nation v. British Columbia* (2007 BCSC 1700), the plaintiff sought a declaration that: the Tsilhqot’in Nation has Aboriginal title to the Claim Area, and Aboriginal rights to hunt and trap in the area; BC does not have jurisdiction to authorize forestry activities within the Claim Area; and the authorization of such activities unjustifiably infringed the Aboriginal title and rights. The plaintiff also sought injunctive relief restraining BC from authorizing forestry activities in the Claim Area in the future, as well as certain damages.

The Appeal Court upheld, in essence, the ruling of the BC Supreme Court. “While I would analyze certain aspects of this case differently than did the trial judge,” wrote Justice Groberman in the Appeal Court’s decision, “I would uphold his order in its entirety.” However, the Appeal Court did not support the BC Supreme Court’s “non-binding opinion” that that the Tsilhqot’in had demonstrated Aboriginal title over some 40 per cent of the Claim Area. "Aboriginal title must be proven on a site-specific basis," Justice Groberman wrote, as defined by a particular occupancy (such as village sites or cultivated fields) or intensive use (such as specific hunting, fishing, gathering, or spiritual sites) undertaken within definable boundaries.

Meet Willms & Shier Legal Experts at these Upcoming Events		
Sept. 15	Ontario Fabricare Association Annual Conference	**Jacquelyn Stevens** will speak about reporting obligations (Federal, Provincial and Municipal) specific to the dry cleaning industry in Ontario.
Sept. 20	The Anatomy of an Environmental Civil Action	**Marc McAree** is co-chair and a speaker at this three-part series, organized by the Ontario Bar Association, Environmental Law Section. On September 20, Marc will present on the role of experts and experts' reports, and 'junk science' in environmental civil litigation.
Sept. 24	Mini-MBA for Mining	**Juli Abouchar** will present a workshop at this mining conference titled "Environmental Considerations and Consulting with Aboriginal Communities: Legal Issues."
Sept. 25	Ontario First Nation Economic Developers Association Conference	**Juli Abouchar** and **Cherie Brant** will conduct a plenary discussion about opportunities for First Nations' involvement in Environmental Assessments.
Oct. 3	Air & Waste Management Association - Air Quality Workshop	**John Willms** will present about recent developments in Ontario air management regulations.
Oct. 17	Six-Minute Environmental Lawyer	**Donna Shier** will moderate this event; **Marc McAree**, **Juli Abouchar** and **Doug Petrie** will present on different environmental issues at this Law Society of Upper Canada continuing legal education program.
Oct. 26	Environmental Law & Regulation in Ontario	**Donna Shier** will present on Limiting Directors & Officers Exposure to Liability for Environmental Losses. **Marc McAree** will present on environmental causes of action, and what to plead and when.

The Appeal Court ruled that the plaintiff's Aboriginal title claim was a "territorial" one, rather than a claim to a definite tract of land that was actually occupied by the Tsilhqot'in at the time of assertion of sovereignty. A "territorial" basis for a claim does not form a viable foundation for a title claim and, accordingly, the claim for title was not made out. However, the Court ruled that the dismissal of the Aboriginal title claim cannot prejudice future claims by the Tsilhqot'in to title to specific areas within the Claim Area.

Applying the *Sparrow* test for justifiable infringements on Aboriginal rights, the Appeal Court upheld the trial judge's findings that the Tsilhqot'in people have an Aboriginal right to hunt and trap birds and animals, including the right to capture and use horses for transportation and work, and the right to trade in skins and pelts taken from the Claim Area. The Appeal Court then agreed with the trial judge that the very acts of planning and authorizing logging infringed the Aboriginal rights of the Tsilhqot'in, "since the planning and authorisation were incompatible with those rights". The Appeal Court suggests that Aboriginal rights rather than Aboriginal title are the primary means to protect the traditional cultures and activities of First Nations and that "any interference with those rights (apart from trivial ones) demands legal protection."

The Tsilhqot'in have stated their intention to appeal the Aboriginal title findings of the BC Court of Appeal to the Supreme Court of Canada.

Willms & Shier Environmental Lawyers LLP
4 King Street West, Suite 900, Toronto, Ontario, M5H 1B6
Tel: 416 863 0711 / Fax: 416 863 1938 / Website: www.willmsshier.com

If you would like to receive Willms & Shier's Environmental Law Report, email your name, title and organization to *jhardacre@willmsshier.com*